BLANK
PAGE

LIBRARY
SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
OCT 20 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 605.

508 CHESTNUT, INC., a Corporation,
Appellant,

v.

THE CITY OF ST. LOUIS, a Municipal Corporation, JOSEPH T. HAYDEN, License Collector, and JOHN H. POELKER, Comptroller,
Appellees.

On Appeal from the Supreme Court of Missouri.

APPELLEES' MOTION TO DISMISS APPEAL.

THOMAS F. McGUIRE,
AUBREY B. HAMILTON,
DANIEL T. TILLMAN,
234 City Hall,
St. Louis, Missouri 63103,
Counsel for Appellees.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

BLANK
PAGE

TABLE OF AUTHORITIES CITED.

	Page
Allied Stores of Ohio v. Bowers, 358 U. S. 522	7
Carmichael v. Southern Coal & Coke Co., 301 U. S. 495, 509	4
Gaulden v. Kirk, 47 So. 2d 567	6
Heisler v. Thomas Colliery Company, 260 U. S. 245, 256, 257	3
Metropolitan Casualty Insurance Company v. Brownell, 294 U. S. 580, 584-585	2
Rast v. Van Deman & Lewis Company, 240 U. S. 342, 357	5
Ring v. Mayor and Council of Borough of North Arlington, 56 A. 2d 744, 136 N. J. L. 494, affd. 1 N. J. 24, appeal dismissed 61 A. 2d 508, 335 U. S. 889	6
Schmitt v. Nord, 71 S. D. 575, 27 N. W. 2d 910, appeal dismissed 334 U. S. 809	6
Walters v. City of St. Louis, 347 U. S. 231	5
Zucht v. King, 260 U. S. 174, 176, 177	1-2

BLANK
PAGE

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 605.

508 CHESTNUT, INC., a Corporation,
Appellant,

v.

THE CITY OF ST. LOUIS, a Municipal Corporation, JOSEPH T. HAYDEN, License Collector, and JOHN H. POELKER, Comptroller,
Appellees.

On Appeal from the Supreme Court of Missouri.

APPELLEES' MOTION TO DISMISS APPEAL.

Come now the appellees and respectfully pray the Court to dismiss the appeal herein for the reason that it does not present a substantial federal question.

In support of their motion appellees show the Court the following:

1. It is settled that an appellant in this Court must present a substantial federal question and that the Court will decline jurisdiction whenever it appears that no such question has been presented. **Zucht v. King**, 260 U. S.

174, 176, 177. In the Zucht case the record was searched in general and no substantial question was found with respect to the validity of the ordinance involved therein. The nature of the burden that rests upon an appellant is stated in **Metropolitan Casualty Insurance Company v. Brownell**, 294 U. S. 580, 584-585, as follows:

> "It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it."

2. Appellant at bar has failed to carry its burden with respect to the presentation of a substantial federal question. The Missouri Supreme Court in its decision herein (Appellant's Jurisdictional Statement, pages 22-23) held that the license tax on hotels and motels imposed by the ordinance challenged by appellant herein was reasonable and was not arbitrary in its distinction between rooms used by transient guests and those used by permanent guests as a method of determining the amount of license tax due, and that the ordinance was also reasonable in its definition of a transient guest as a person who occupies a room in a hotel or motel for thirty-one days or less. The opinion pointed out that the classification of rooms used by transient and not permanent guests was based upon such established considerations as higher income from transient rooms, the greater attention to business

activity, including greater supervision required in operating transient rooms, and the fact that the rental of transient rooms involve the catering of the hotel or motel to a different class of trade—all being distinctions well known in the field of hotel and motel operation. Nothing appears in the record that would change in any way the foregoing facts that are specified in the opinion of the Missouri Supreme Court and relied upon by that Court to determine the reasonableness of the ordinance that has been challenged as invalid herein.

3. The sole ground relied upon by appellant to challenge the insufficiency of the license tax ordinance is an insufficient one, namely, that the impact of the ordinance has an improper effect upon the economic competition among hotels and motels. Appellant states its point on page 6 of its Jurisdictional Statement by claiming that under the ordinance the appellant "must for no reasonable purpose be forced to **compete economically** within the same geographical location and with a far greater tax burden than a similar business which either has no or substantially less transient guests." (Emphasis supplied.) Appellant advances its same "economic argument" on page 8 of its Jurisdictional Statement toward the end of its Argument on that page.

There is no economic discrimination of any significance under the operation of the license tax ordinance. All hotel or motel operators who have transient guests pay a tax on the same basis and those operators who have no transient guests are likewise treated on an equal basis by not being subjected to the tax. Indeed, an argument based on economic competition as a ground for finding a violation of the equal protection clause has been rejected by this Court in **Heisler v. Thomas Colliery Company**, 260 U. S. 245, 256, 257, which held that the imposition of a tax on anthracite coal and not on bituminous coal was based

upon a reasonable classification of the subject of tax and that the commercial competition between the two types of coal is not a sufficient reason to require that they be classified separately for purpose of taxation.

4. We draw the attention of the Court to a misleading statement appearing on page 8 of Appellant's Jurisdictional Statement which states that the license tax ordinance has the effect of "exempting the hotel which has guests staying over thirty-one days." The facts are otherwise. No hotel is exempted from tax. The tax is placed upon **all** hotels and motels, measured by the percentage of gross rental receipts due from or paid by transient guests. See Sec. 29-108 of Ordinance 52030 of the City of St. Louis, set forth on page 68 of the Appellant's Jurisdictional Statement.

5. The principles of reasonable classification which are applicable in determining the issues raised by appellant in its appeal are well stated in **Carmichael v. Southern Coal & Coke Co.**, 301 U. S. 495, 509, as follows:

> "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection impose upon a state any rigid rule of equality of taxation. This Court has repeatedly held that inequalities which result from a single use of one particular class for taxation or exemption, infringe no constitutional limitation.
>
> "Like considerations govern exemptions from the operation of a tax imposed on the members of a class. **A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to jurisdictional scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.**" (emphasis supplied.)

In the Carmichael case the Court upheld the Alabama Unemployment Compensation Act which applied to employers of eight or more employees who work twenty or more weeks within a year and which exempted certain classes of employees against the contention that the arbitrary division by number and the exemption of certain classes violated the due process and equal protection clauses of the Fourteenth Amendment. The emphasized language employed by this Court in the Carmichael opinion is squarely applicable to the contentions made by appellant at bar. The license tax ordinance is not required to reach all hotel rooms regardless of the nature of their use but may make a reasonable distinction, as it does, between those used by transient guests and those used by permanent guests.

The principles enunciated in the Carmichael case have been followed in a long line of decisions before and after that decision. In **Walters v. City of St. Louis,** 347 U. S. 231, an ordinance taxing earnings which separately treated wages (on a gross basis) and profits (on a net basis) was upheld against the contention that the classification violated the due process and equal protection clauses. The Court pointed out that the power of the state to classify according to occupation for the purpose of taxation was a broad power and that the equal protection clause does not require identity of treatment. It was a sufficient distinction to justify the classification that wages were relatively fixed, whereas profits usually fluctuate.

In **Rast v. Van Deman & Lewis Company,** 240 U. S. 342, 357, a license tax on merchants using profit-sharing coupons and trading stamps was held not to violate the due process or equal protection clauses of the Fourteenth Amendment. It is quite clear that the measurement of the amount of a license tax payable by hotels or motels dependent upon the use of rooms for transients is as per-

missible a subclassification as is the subclassification of merchants employing certain merchandise aids.

This Court has very frequently denied appeals for want of a substantial federal question when the issue involved was whether or not a license tax was based upon a reasonable classification to determine the impact of the tax. Examples of such instances are **Ring v. Mayor and Council of Borough of North Arlington**, 56 A. 2d 744, 136 N. J. L. 494, affd. 1 N. J. 24, appeal dismissed 61 A. 2d 508, 335 U. S. 889, which held that a license tax imposed by a municipality for revenue purposes upon secondhand motor vehicle dealers and not upon new car dealers was not unconstitutional as either arbitrary or capricious, and **Schmitt v. Nord**, 71 S. D. 575, 27 N. W. 2d 910, appeal dismissed 334 U. S. 809, holding that an excise tax on the privilege or occupation of sale of butter substitutes was not repugnant to the due process or equal protection clauses even though it was motivated by a purpose to discourage butter substitutes.

An en banc decision of the Florida Supreme Court, **Gaulden v. Kirk**, 47 So. 2d 567, upheld the validity of a license tax on persons who engage in the business of renting or leasing living quarters measured by 3% of the rental charged and specifically ruled that there was no improper discrimination under the Fourteenth Amendment by exempting a landlord from the tax if the guest had occupied the accommodations for a period of less than six months. The Court held that it was appropriate for the Legislature to place the business of landlord who rents to transients in a different class from that of the landlord who rents to permanent guests or tenants. The Florida Supreme Court decision is squarely in accord with the controlling principles laid down in repeated decisions of this Court as evidenced in part by the decisions cited in this paragraph. The application of those prin-

ciples to the facts at bar shows clearly that no substantial federal question has been presented herein.

6. In its Jurisdictional Statement appellant has cited five cases in its attempt to persuade this Court that substantial federal questions have been presented. None are persuasive.

Allied Stores of Ohio v. Bowers, 358 U. S. 522, supports the position of appellees herein. In that case an Ohio statute taxed all personal property used in business in the State but exempted merchandise or agricultural products owned by nonresidents and held in a warehouse for storage only. A resident who was taxed on merchandise stored in a warehouse while awaiting delivery to a retail store claimed that the tax violated the equal protection clause. At page 527 of its opinion this Court said:

> "If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of equal protection of the law."

At page 528 this Court further said:

> "That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy."

and, further:

> "* * * **it has long been settled** that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it." (emphasis supplied.)

This Court held that it could not be said that the Ohio statute was either invidious or arbitrary and appellees

submit that the ordinance at bar shows on its face that it is neither invidious nor arbitrary.

The remaining cases cited by appellant do not involve factual situations that are comparable to the facts at bar and announce no principles that are contrary to those set forth herein.

Wherefore, for the reasons stated, appellees pray that appellant's appeal herein be dismissed for want of a substantial federal question.

Respectfully submitted,

THOMAS F. McGUIRE,
City Counselor,
AUBREY B. HAMILTON,
Associate City Counselor,
DANIEL T. TILLMAN,
Associate City Counselor,
234 City Hall,
St. Louis, Missouri 63103,
Attorneys for Appellees.

END